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Leak Reveals NAFTA Renegotiation Objectives

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A recently leaked draft letter from the Acting U.S. Trade Representative (“USTR”) Steven Vaughn, which would notify Congress of the Administration’s intent to request renegotiation of the North American Free Trade Agreement (“NAFTA”), provides an insight into the specific objectives that the United States will likely seek in its deliberations with Canada and Mexico.

The Administration is required to submit such a letter to Congress per the mandates of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (“TPA”). Specifically, the TPA requires that the Administration provide 90-days’ notice and consult with Congress on the initiation and performance of the proposed trade negotiations, the date on which the proposed negotiations are intended to be launched, the objectives of the negotiations, and whether a new agreement is sought or whether an existing one will be amended. Further revisions of the letter by the USTR are expected in the near future.

Surprisingly, the letter begins by readily acknowledging the positive effects the NAFTA has had on the U.S. economy since its entry into force in 1994. For example, the letter notes at the outset that the United States’ largest export markets are Canada and Mexico, and that the U.S. is the largest destination for Canadian and Mexican exports. Since 1993, U.S. trade with Canada and Mexico has more than tripled from \$293 billion to \$1.07 trillion in 2016 with respect to trade in goods, and from \$43 billion to \$193 billion in 2015 for trade in services. In fact, 29 percent of U.S. exports of goods are made to Canada and Mexico each year, and these countries represent the largest export markets for U.S. manufacturing, the 1st and 3rd largest markets for U.S. agricultural goods, and the 2nd and 3rd largest sources of U.S. imports.



Nonetheless, the letter states that renegotiation of the NAFTA is warranted because of the persistent U.S. deficit with respect to trade in goods, as well as arguments that:

- Many portions of the NAFTA are obsolete and outdated
- The current agreement does not reflect the standards that were incorporated into more recently concluded and implemented free trade agreements
- Canada and Mexico’s respective VAT (value-added tax) regime discriminates against U.S. exports
- Enforceable labor and employment provisions should be included within the body of the agreement itself—not as side agreements
- Permits, licenses, redundant testing and certification requirements, as well as other restrictive measures applied to imports into Canada and Mexico should be reduced or eliminated
- The NAFTA rules of origin for goods traded between the U.S., Canada and Mexico should be modified so as to support production and jobs in the United States

- Challenges to dumping and subsidy disputes involving goods traded amongst the NAFTA parties should be addressed by the courts—not by arbitration panels.

The letter states that the overarching goal of the NAFTA renegotiation effort will be to increase economic growth by making it more profitable to manufacture within the NAFTA trading bloc, thereby promoting job creation, strengthening the U.S. manufacturing base, and supporting rural communities by expanding access for U.S. exports of agricultural goods as well as promoting services and “innovation industries.” Based on the specific objectives described in the letter, it appears that the Administration, at least at this early stage, intends to pursue a much more modest approach for the renegotiation as compared to the prior criticisms and rhetoric about the NAFTA that were made during the presidential campaign. In fact, several of the stated objectives reflect those that were contained in the Trans-Pacific Partnership agreement (“TPP”), from which the U.S. formally withdrew on January 23rd (e.g., the elimination of barriers on digital trade, the pursuit of more robust food safety requirements, improved trade facilitation, more aggressive protection and enforcement of intellectual property rights, and increased investment opportunities, etc.).

The following table summarizes the specific objectives outlined in the draft letter.

Specific Objectives for Labor	<ul style="list-style-type: none"> • Adopt measures implementing internationally recognized labor rights and effectively enforce the labor laws concerning those rights. • Promote respect for internationally recognized labor rights, including those embodied in the ILO Declaration on Fundamental Principles and Rights at Work and ILO Convention 182 on the Worst Forms of Child Labor, and effectively enforce their respective labor laws. • Place enforceable labor obligations within the body of the agreement.
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<p>Specific Objectives for Agriculture as well as Sanitary and Phytosanitary Measures</p>	<ul style="list-style-type: none">• Reduce or eliminate non-tariff barriers on U.S. agricultural exports.• Eliminate export subsidies on agricultural products.• Maintaining the right to provide bona fide food aid.• Preserving U.S. agriculture market development and export credit programs.• Robust rules on sanitary and phytosanitary measures.• Elimination of sanitary and phytosanitary measures that are not based on science.• Strengthen cooperation between the authorities of the U.S., Canada and Mexico.
<p>Specific Objectives for Rules of Origin</p>	<ul style="list-style-type: none">• Seek rules of origin that ensure that the NAFTA supports production and jobs in the United States, procedures for applying these rules, and provisions to address circumvention.
<p>Specific Objectives for Customs Matters and Enforcement Cooperation</p>	<ul style="list-style-type: none">• Improve upon the parties' WTO trade facilitation commitments.• Conduct customs operations with transparency, efficiency and predictability.• Strengthen collaboration in implementing the WTO Trade Facilitation Agreement.• Create a process for exchanging information on trade facilitation-related issues.• Cooperative efforts for enforcement of customs rules and related issues.
<p>Specific Objectives for Technical Barriers to Trade</p>	<ul style="list-style-type: none">• Improve the parties' WTO technical barriers to trade commitments.• Eliminate unnecessary measures.• Strengthen collaboration in implementing the WTO TBT Agreement.• Create a procedure for exchanging information on TBT-related issues.





<p>Specific Objectives for Intellectual Property Rights</p>	<ul style="list-style-type: none">• Establish standards reflected in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and other international intellectual property agreements, such as the WIPO, the WIPO Performances and Phonograms Treaty, and the Patent Cooperation Treaty.• Secure fair, equitable and nondiscriminatory market access opportunities for U.S. persons that rely on intellectual property protection.• Strengthen laws and procedures on enforcement of IPR (e.g., ensure that authorities can seize and destroy infringing goods and the equipment used to make counterfeit goods, as well as documentary evidence).• Strengthen measures that provide for compensation of right holders for IPR infringements.• Provide for criminal penalties under their laws that are sufficient to have a deterrent effect on piracy and counterfeiting.
<p>Specific Objectives for Trade in Services</p>	<ul style="list-style-type: none">• Expand market opportunities for U.S. services, to obtain fairer and more open conditions of services trade, improve transparency and predictability.• Pursue specialized disciplines for financial services and additional disciplines for telecommunications and other sectors.• Competitive approach to market access including improvements in access to the telecommunications, financial services, express delivery, professional services or other sectors, and address the operation of any designated monopolies or state enterprises.
<p>Specific Objectives for Investment</p>	<ul style="list-style-type: none">• Reduce or eliminate artificial or trade-distorting barriers to U.S. investments.• Secure for U.S. investors rights and protections akin to those available in the U.S..• Ensure that U.S. investors receive favorable treatment in the NAFTA countries.• Address unjustified barriers to U.S. investments in NAFTA countries.• Improve rules to resolve disputes between U.S. investors and NAFTA countries.





Specific Objectives for Digital Trade and Cross-Border Data Flows	<ul style="list-style-type: none">• Refrain from imposing customs duties on digital products.• Refrain from unjustifiably discriminating against products delivered electronically.• Refrain from impeding digital trade in goods and services.• Refrain from restricting cross-border data flows.• Refrain from requiring local storage or processing of data.
Specific Objectives for Government Procurement	<ul style="list-style-type: none">• Conduct government procurement consistent with U.S. law and policy.• Expand U.S. market access in the CA and MX government procurement markets.
Specific Objectives for Transparency of Regulatory Reform	<ul style="list-style-type: none">• Make administration of trade and investment regime more transparent.• Permit timely and meaningful public comment before adoption of measures.• Consultative mechanisms to improve regulatory practices.
Specific Objectives for Anti-Corruption	<ul style="list-style-type: none">• Ensure that the NAFTA countries apply high standards prohibiting corrupt practices affecting international trade and investment and have effective domestic enforcement mechanisms.
Specific Objectives for Competition	<ul style="list-style-type: none">• Address anticompetitive business conduct and other competition-related matters• Cooperation on competition law and policy.• Consultations on competition issues that may arise.
Specific Objectives for State-Owned and State-Controlled Enterprises	<ul style="list-style-type: none">• Eliminate or prevent trade distortions and unfair competition favoring state-owned or state-controlled enterprises to the extent of their engagement in commercial activity.• Ensure transparency in the level of ownership, control and support of state-owned enterprises.
Specific Objectives for Trade Remedies	<ul style="list-style-type: none">• Safeguard mechanism for temporary revocation of tariff preferences.• Preserve U.S. ability to enforce its trade remedy laws.





<p>Specific Objectives for the Environment</p>	<ul style="list-style-type: none"> • Effectively enforce environmental laws. • Undertake implementation of applicable multilateral environmental agreements. • Promote sustainable development and address environmental issues. • Eliminate fisheries subsidies that distort trade. • Address illegal, unreported and unregulated fishing. • Seek enforceable environmental obligations within the body of the agreement.
<p>Specific Objectives for Antidumping and Countervailing Duty (“AD/CVD”) Dispute Settlement (NAFTA Chapter 19)</p>	<ul style="list-style-type: none"> • Eliminate the Chapter 19 dispute settlement of AD/CVD determinations in light of U.S. experiences where panels have ignored the appropriate standard of review and applicable laws, and where aberrant panel decisions have not been effectively reviewed and corrected.
<p>Specific Objectives for State-to-State Dispute Settlement and Institutional Provisions</p>	<ul style="list-style-type: none"> • Early identification and settlement of disputes through consultation. • Improve procedures designed to increase compliance with the agreement. • Review the NAFTA 5 years after entry into force to ensure proper implementation.

Once the letter is revised, finalized and submitted to Congress and consultations get underway, advisory groups within the House Ways and Means and Senate Finance Committees will begin working with the President on the specified objectives of the negotiations, the potential impact of any proposed tariff changes on certain products will be examined, and industry stakeholders (especially those in import-sensitive sectors) will have an opportunity to weigh in and submit their comments. It is likely that the kick-off date for the NAFTA negotiations, once it is announced, will be pushed back until Robert Lighthizer is confirmed as the new U.S. Trade Representative, as his participation in the trade talks will be key.





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